# Yahya bin Kassim v Government of Malaysia & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N–01–157 OF 1995

MAHADEV SHANKAR, ABU MANSOR AND DENIS ONG JJCA

3 MARCH 1997

***Civil Procedure*** *— Declaration — Application for declaration to declare reduction in rank void — Requirements for certiorari — Must be within six weeks of decision — Whether appellant can avoid requirements by applying for declaration — Rules of the High Court 1980 O 53 r 1A*

The appellant, a senior clerical officer in the State Treasury Office, was alleged to have committed an act of misconduct. The second defendant, the Public Services Commission ('the PSC'), decided that the appellant be punished by a reduction in rank from senior clerical officer to clerical officer. This decision was communicated to the appellant on 26 September 1987. The appellant's appeal to the PSC was rejected on 30 March 1988. On 28 February 1990, he filed a writ, seeking a declaration from the High Court that his reduction in rank was void and consequential relief in the form of damages. The trial judge dismissed the action. The appellant appealed.

**Held**, dismissing the appeal:

Order 53 r 1A of the Rules of the High Court 1980 provides that applications for an order of certiorari to quash a decision must be made within six weeks of the decision in question. Leave is required before the substantive application can be filed. The failure to apply within the time limit is usually fatal. In this case, the appellant only filed a writ for a declaration that his reduction in rank was void 29 months after the decision was communicated to him.

Further, it was an abuse of process on the part of the appellant to resort to an action for declaration in order to evade the clear requirements of O 53 r 1A. The appellant's appeal was, therefore, devoid of any merit and was dismissed accordingly (see pp 751I and 752A–C, H).

**[Bahasa Malaysia summary**

Perayu, seorang pegawai kerani kanan di Pejabat Perbendaharaan Negeri, dikatakan bersalah atas perbuatan salah laku. Defendan kedua, Suruhanjaya Perkhidmatan Awam ('SPA'), memutuskan bahawa perayu harus dihukum dengan penurunan pangkat dari pegawai kerani kanan kepada pegawai kerani. Keputusan ini dimaklumkan kepada perayu pada 26 September 1987. Rayuan perayu kepada SPA ditolak pada 30 Mac 1988. Pada 28 Februari 1990, beliau memfailkan suatu writ, yang meminta suatu perisytiharan daripada Mahkamah Tinggi bahawa penurunan pangkat adalah terbatal dan relief berbangkit dalam bentuk ganti rugi. Hakim perbicaraan membatalkan tindakan. Perayu membuat rayuan.

**Diputuskan**, menolak rayuan:

Aturan 53 k 1A Kaedah-Kaedah 1980 memperuntukkan bahawa permohonan-permohonan untuk suatu perintah certiorari bagi membatalkan keputusan mesti dibuat dalam tempoh enam minggu selepas keputusan berkenaan. Kebenaran diperlukan sebelum permohonan substantif boleh difailkan. Kegagalan untuk memohon dalam tempoh had masa biasanya adalah padah. Dalam kes ini, perayu hanya memfailkan writ untuk perisytiharan bahawa penurunan pangkat adalah terbatal 29 bulan selepas keputusan dimaklumkan kepadanya.

Selanjutnya, adalah satu penyalahgunaan proses pada pihak perayu untuk memulakan tindakan untuk perisytiharan bagi mengelak keperluan-keperluan jelas A 53 k 1A. Rayuan perayu adalah tanpa merit dan ditolak dengan sewajarnya (lihat ms 751I dan 753A–C, H).]

**Notes**

For cases on application for declaration, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1107–1114.

**Cases referred to**

*O'Reilly & Ors v Mackman & Ors* [1983] 2 AC 237 (refd)

*V Paul Raj Chelladurai v Jabatan Telekom Malaysia Bhd & Ors* [1997] 2 MLJ 764 (refd)

**Legislation referred to**

Rules of the High Court 1980 O 18 r 19, O 53 r 1A

*Haresh Mahadevan* (*Aris Rizal Christopher Fernando & Co*) for the appellant.

*Mary Lim* (Penasihat Undang-undang Negeri Sembilan) for the respondents.

**Mahadev Shankar JCA** (delivering the judgment of the court): The appellant unsuccessfully applied to the High Court for a declaration that his reduction in rank was void, and for consequential relief including damages. We dismissed his appeal with costs. Our reasons now follow.

The appellant was a senior clerical officer in the State Treasury Office in Seremban. On 26 August 1986, there was an incident in the office between the appellant and his head of department, En Sofian bin Kochik. On 1 September 1986, the appellant was transferred to the district office at Jempol. His superior here was district officer En Ismail bin Dolah Harun.

By a letter dated 21 May 1987, the second defendant (the Public Service Commission ('the PSC')) required the appellant to show cause why disciplinary action by way of dismissal or some lesser punishment should not be taken on account of two charges. The first related to the incident aforesaid. It was alleged that the appellant had shouted at En Sofian

A bin Kochik and, in the course of doing so, had punched the table and broke the glass top thereby committing an act of misconduct. The second charge related to absences from office on 46 diverse dates between 11 May 1986 to 30 August 1986.

On 16 June 1987, the appellant sent a very long four-page letter in
B answer to the charges. The letter is so very detailed that it cannot be contended that the appellant did not ensure that he said all he could at that stage. In effect, he admitted the facts in the first charge but claimed he had acted on a sudden outburst and without pre-meditation. He did not deny he broke the glass table but said he did so 'to emphasize a point'. As to the second charge, he pointed out that of the 46 days listed, one was a
C Saturday afternoon, one was a Sunday, two were public holidays, and three were 'rest days'. He then listed in detail the mitigating circumstances why he was not at his place of work. He pleaded that the punishment inflicted should not be dismissal but something lighter. His exacts words were:

D > Oleh yang demikian, sekali lagi, saya memohon maaf di atas segala perbuatan saya yang telah terlanjur. Saya memohon belas ikhsan tuan agar saya diberikan peluang terakhir. Hukumilah saya dengan lain-lain hukuman yang lebih ringan yang difikirkan patut selain daripada menerima hukuman buang kerja atau pun turun pangkat.

E The second defendant considered these representations at a formal meeting on 14 September 1987 and decided that the appellant be punished by a reduction in rank from senior clerical officer to clerical officer. This decision was communicated to him by a letter dated 26 September 1987.

Upon receipt of it, the appellant sent an appeal by letter dated
F 10 October 1987. This is again a very long three-page letter. He now claimed that he only admitted the charges because he was asked to do so by his superior En Ismail bin Dolah Harun. His material words are as follows:

> Kenyataan ini tidak saya sebutkan di dalam jawapan saya terhadap pertuduhan tuan melalui SPA.SULIT.44769/3/10 bertarikh 21 Mei 1987.
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> Kerana mematuhi dan menghormati nasihat Tuan Pegawai Daerah Jempol selaku ketua jabatan saya supaya menjawab semua pertuduhan tuan secara positif mengaku dan meminta maaf di atas kesalahan yang telah dilakukan. Ini dibuat dengan harapan agar pihak tuan akan menimbangkan hukuman yang lebih ringan daripada menerima hukuman turun pangkat.

H Encik Ismail bin Dolah Harun supported the appeal with his own letter dated 13 October 1987 in which he said:

> Saya mengesahkan kenyataan beliau di para 3(b) adalah benar dengan harapan agar beliau akan diberi peluang yang akhir sebelum tindakan menurunkan pangkat atau memberhentikan beliau diambil.

I The PSC considered this appeal on 21 March 1988 and rejected it. The rejection was confirmed by a letter dated 30 March 1988.

At this juncture, we wish to draw the attention of all concerned to O 53 r 1A of the Rules of the High Court 1980 ('the RHC'). Applications

for certiorari must be made within six weeks of the decision which is impugned. Leave is required before the substantive application is filed. The failure to apply within the time limit is usually fatal. There are powerful reasons why these provisions have been enacted. We touched on them in *V Paul Raj Chelladurai v Jabatan Telekom Malaysia Bhd & Ors* [1997] 2 MLJ 764. Practitioners could refer to the commentaries in *The Supreme Court Practice* (1997) Vol 1 at p 844 at seq and *Malaysian Court Practice* (Malayan Law Journal) at para 53.1.1 (p 3717 at seq) but quaere para 53.1.8 (certiorari or declaration at p 3733).

The appellant did not move until 28 February 1990, ie 29 months later. With the assistance of solicitors, he filed a writ with the prayers referred to earlier. The only grounds pleaded in support are that he was not given a full opportunity to make representations in his letter dated 16 June 1987 because he had to rely on his memory to exculpate himself. Nowhere in this letter is there any request for access to any documents to help him put up his defence. Nor is there anything about his having been induced or pressurized into including material in his letters which he did not believe to be true.

Initially, the appellant sued the two respondents above stated and the State Secretary Negeri Sembilan. On 22 August 1990, the first and second respondents filed for summons in chambers to strike out the action under O 18 r 19 of the RHC, relying on all its limbs including abuse of process. No information has been provided to us as to what happened to this application.

On 25 September 1990, the State Secretary applied by summons in chambers to have his name removed. This was heard on 27 July 1993 and an order in terms was made. The action continued against the other two respondents.

The trial took place on 5 September 1995. The appellant gave evidence. He did not call any witnesses. The principal assistant secretary of the relevant section of the PSC also gave evidence. After submissions, the trial judge adjourned and gave his decision on 19 September 1995. He dismissed the action with costs.

If the appellant was entitled to ventilate his claims before us, we must say we fully agree with everything the trial judge said about this claim.

Quite apart from the fact that the appeal was devoid of merit, we are astonished that the appellant was persuaded to bring it, because it is an abuse of process to resort to an action for declaration and thereby evade the clear requirements of O 53 r 1A of the RHC. Our rules on this subject are almost in pari materia with the English rules. The subject has been decided in *O'Reilly & Ors v Mackman & Ors* [1983] 2 AC 237. It should suffice to set out the relevant part of the headnote. It reads (at p 238):

> Held, dismissing the appeals, that since all the remedies for the infringement of rights protected by public law could be obtained on application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the

A plaintiff was for a declaration that the board of visitors' adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals (post, pp 274H–275A, 285D–E, G–H and 286A–C).

It is a pity this action was ever allowed to get off the ground because it was B such an obvious non-starter.

*Appeal dismissed.*

Reported by David Lai

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